

Educational and Recreational Services, Inc., d/b/a Associated Charter Bus Company, San Bernardino Division and United Steelworkers of America, AFL-CIO, Petitioner. Case 31-RC-4910

April 29, 1982

DECISION ON REVIEW AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On March 11, 1981, the Acting Regional Director for Region 31 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found that it would effectuate the purposes of the Act to assert jurisdiction over the Employer. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Acting Regional Director's decision on the grounds that, in asserting jurisdiction, he departed from officially reported Board precedent and made clearly erroneous findings of fact. The Petitioner filed a brief in opposition to the Employer's request for review.

By telegraphic order dated April 9, 1981, the Board granted the request for review and stayed the election pending decision on review. Thereafter, the Employer filed a brief in support of its request for review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review, including the Employer's request for review and supporting brief and the Petitioner's brief in opposition, and makes the following findings:

The Employer, a subsidiary of ARA Services, Inc., is a California corporation primarily engaged in providing school bus transportation to the San Bernardino Unified School District (herein referred to as the District). At its San Bernardino terminal, the Employer employs a general manager, an assistant manager, a head dispatcher, a dispatcher, several office clerical employees, 5 or 6 driver-trainees, a shop supervisor, 8 mechanics, a bus washer, and approximately 200 bus drivers. The Petitioner seeks to represent a unit of school bus drivers and mechanics at the Employer's San Bernardino facility.

The parties have stipulated that the District is an exempt employer within the meaning of Section 2(2) of the Act. In opposing the petition, the Employer contends that it is a joint employer with the

District and shares that governmental entity's exemption from the Board's jurisdiction. The Acting Regional Director, however, found that the Employer retains sufficient control over the employment conditions of its employees to enable it to engage in meaningful collective bargaining with the Petitioner. Applying the "right to control" test articulated in *National Transportation Service, Inc.*, 240 NLRB 565 (1979), the Acting Regional Director found assertion of jurisdiction over the Employer to be appropriate and directed an election in the petitioned-for unit. For reasons set forth below, we find that the Acting Regional Director erred in asserting jurisdiction.

Pursuant to the Employer's current contract with the District, an agreement effective from July 1, 1980, until June 30, 1985, the Employer provides regular bus transportation between home and school for approximately 5,500 of the District's students as well as transportation for integration programs, special education programs, and field, athletic, and other trips. For providing this service in 1980, the Employer received approximately \$3.1 million in gross revenues. The Employer also annually receives approximately \$20,000 for charter bus work outside its contract with the District. All the charter bus drivers also drive school buses. The District itself covers 100 square miles and contains 52 separate schools, and the Employer uses approximately 150 buses per day to transport the students.

The District retains considerable rights under the current contract to control the terms and conditions of employment of the Employer's drivers. The contract, *inter alia*, provides the District with final approval over and the right to make changes in routes and schedules planned by the Employer; reserves to the District the right to require that a specific driver be assigned a specific route; requires that, to the extent possible, drivers be permanently assigned to the same bus routes and that the Employer must give advance notice to the District of routes to be driven by a relief, substitute, or newly assigned regular driver; provides that any employee whom the District deems to be incompetent, disorderly, or to have acted improperly shall not be used by the Employer in the performance of the contract; requires that at least once every 6 months all drivers must pass an on-the-road skills test conducted by a District representative at a time and route of the representative's choosing, without prior notification to the driver; permits the District to call periodic driver meetings with mandatory attendance; requires school bus evacuation drills to be coordinated with the District; specifies that the Employer must give the District notice of any

actual or potential labor dispute which is delaying, or threatening to delay, timely performance of the contract; forbids dispatchers and management personnel from driving the buses except in emergencies; and forbids the Employer from assigning or subcontracting its duties without the District's written consent. If the Employer fails to comply with the contract's terms, the District may unilaterally deduct liquidated damages from its payments to the Employer or cancel the contract.

The District also exercises certain controls over the Employer's employees which are not specifically delineated in the contract. Although the contract is silent on wages, benefits, and working conditions of the Employer's employees, the District has had considerable influence in these matters.

The Employer's general manager, John Zubiena, testified, without contradiction, that the Employer has never increased wages on its own and would not even contemplate doing so without consulting with the District. When the Employer seeks to justify its annual request for increased compensation from the District by showing increased operating costs, it will also submit any proposed wage and benefit changes. The extent of the District's control over the Employer's wage scale was manifest during negotiations for renewal of the school bus transportation contract in 1980. The District agreed that the wage rates for the Employer's employees should be raised,¹ but it rejected three of the Employer's wage proposals and then opened the bidding generally to other businesses before finally accepting the Employer's fourth wage proposal. The District considered the first three proposed wage increases too high and rejected them in anticipation of negotiation problems with its own employees.

Prior to executing the current renewal of the transportation contract, the District also required that the Employer institute major medical and life insurance coverage for the Employer's employees, and requested that the Employer make certain improvements in other conditions of employment by repairing the parking lot, cleaning the bathrooms and drivers' lounge, and furnishing the drivers' lounge with furniture and vending machines. The Employer complied with these directives.

District personnel play a dominant role in directing the Employer's daily operations. It is undisputed that the Employer does not employ enough supervisors and relies on the District to provide additional supervision. The drivers' handbook, co-authored in 1980 by the Employer and the District, provides that refusal to obey a direct order of an employer supervisor or of District personnel may

result in discipline up to and including discharge, and that violation of a District policy or infraction of a District rule or regulation, whether posted, written, or given orally by a person of authority in the District, shall subject the driver to discipline. The handbook also states that discipline of employees shall be imposed by the Employer after consultation with the District.

The District's staff at the Employer's terminal includes Supervisor of Transportation Wayne King, five transportation specialists, a transportation technician, and eight or nine school bus aides. King is the focal point of the District's presence in the terminal. He has a desk in the Employer's office and spends approximately 6 hours per day there. When Zubiena was first assigned to the San Bernardino terminal, the Employer's area manager instructed him to report to King and to perform whatever duties King required. Zubiena further testified that all decisions he makes are subject to King's approval.

Additional evidence substantiates Zubiena's view that King, in practice, has supreme authority over the Employer's daily school bus operations. King or another District representative currently takes part in employment interviews for driver and dispatcher positions and regularly instructs the Employer's general manager to hire or not to hire applicants. These instructions have been followed without exception. Although a representative of the Employer also sits in on hiring interviews, it is King or his District substitute who makes the final decision to hire or not to hire.

In many instances, King wields supreme disciplinary authority over the Employer's employees. He has established a nondiscretionary rule of progressive discipline for employees who are late to work. He reviews evaluations prepared by District personnel concerning drivers' performances on the road, conducts investigatory and disciplinary interviews based on these evaluations, and may instruct the Employer to discipline or to provide additional training for a driver.² King also has the authority to review for approval all disciplinary warnings about nondriving employee conduct. These warnings are prepared on the Employer's forms by the Employer's dispatchers and are pre-approved by Zubiena. King has personally decided to suspend two drivers and directed the Employer to discharge another.

² In assessing the extent of the District's authority over disciplinary matters involving the Employer's employees, and particularly that authority exercised by King, it is significant to note that the District has precluded certain drivers from driving any bus within the District. This action is tantamount in most instances to suspension or termination because the Employer's charter bus service offers very limited employment opportunities.

¹ The District had denied a prior wage increase request in February or March 1980.

The District's five transportation specialists are each responsible for route schedules within a geographic territory. They spend 1 or 2 hours per day at the Employer's terminal and approximately 4 hours per day in District cars following and observing the Employer's buses. The transportation specialists, or alternatively the Employer's dispatcher, handle as many as 75 route change requests from drivers per day. On the road, the transportation specialists have exercised their authority to order bus drivers to stop the bus if they observe any safety violation. They record any state law violations or other driver misconduct observed on evaluation forms which go to both King and Zubieta. The transportation specialists also exercise the District's contractual authority to board the buses for semiannual on-the-road driver skills tests and for bus evacuation drills. They report any deficiencies in these tests to King.

To a lesser extent, the District plays a role in directing the Employer's daily operations through its transportation technician and its aides. The transportation technician spends nearly all his time at the Employer's terminal and in a joint effort with the Employer's head dispatcher determines the bus routes.³ Where there is a difference of opinion between these two, the transportation technician prevails. The aides are assigned to ride on buses with especially long or troublesome routes where the driver may need assistance in maintaining discipline among the students. They can evaluate drivers' performances and drivers have been subjected to disciplinary interviews as a result of these evaluations.

Despite the foregoing evidence, the Acting Regional Director concluded that the District has not usurped the Employer's dominant role in establishing the employment conditions of its drivers. In making this finding, the Acting Regional Director placed great weight on the absence of the District's express contractual authority over the Employer's operation and minimized the significance of evidence indicating the substantial control actually ex-

³ We note that the District has substantial control over the assignment of bus routes, as well as the scheduling of routes. Compare *Kal Leasing, Inc.*, 240 NLRB 892, 893 (1979), in which the Board noted that control over the employees' route assignments is relevant in determining the degree of control over terms and conditions of employment.

ercised by the District. He concluded that the Employer retains wide discretion in the wages and benefits it pays its employees. We disagree and find that under the right-to-control test set forth in *National Transportation Service, Inc.*, *supra*, we must decline to assert jurisdiction.

Contrary to the rationale expressed by the Acting Regional Director, the Board regularly looks beyond contractual form to substantive practices in order to ascertain the true nature of an Employer's labor relations.⁴ Here, not only does the District have considerable authority over the Employer's operations by virtue of express language in the parties' contract and in the drivers' handbook, but, as uncontroverted evidence of the established operational practices at the Employer's San Bernardino terminal conclusively demonstrates, the District exercises extensive control over the wages, benefits, hiring, discipline, supervision, and work assignments of the Employer's employees.⁵ In sum, the record demonstrates that the District has substantial control over the Employer's labor relations and is a joint employer of the Employer's employees.⁶ We therefore conclude that we are precluded from asserting jurisdiction here and we shall dismiss the petition.⁷

ORDER

It is hereby ordered that the petition be, and it hereby is, dismissed.

⁴ E.g., *K.A.L. Leasing, Inc.*, 254 NLRB 1118 (1981).

⁵ We reject, in particular, the Acting Regional Director's suggestion that the Employer could improve wages and benefits from non-District revenue sources. Revenues from those sources constitute less than one-hundredth of 1 percent of the Employer's annual gross income and are not likely to increase significantly unless the Employer undertakes a major change in the size and scope of its enterprises.

⁶ See *ARA Services, Inc.*, 221 NLRB 64 (1975).

⁷ On the same date that review was granted in this case, the Board also granted review on the same jurisdictional issue arising in the same Region in *Reco Buses, Inc.*, Case 31-RC-4914. On August 7, 1981, in an unpublished decision, the Board affirmed the Acting Regional Director's decision and asserted jurisdiction over that school bus employer. Unpublished Board decisions affirming regional determinations have no binding precedential value. Given the coincidences of timing, issue, and Board Region in these two cases, however, and to clarify these rulings for the guidance of Region 31 and the parties involved, we note that there are significant factual distinctions between the two cases. In particular, the employer in *Reco Buses* manifested control over its own labor relations by doing its own hiring subject only to the school district's legal requirements and by independently setting the wages and benefits for its drivers.